

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2012-404-007730

UNDER

the Unit Titles Act 2010

BETWEEN

BODY CORPORATE 346799 a Body Corporate
constituted pursuant to the Unit Titles Act 2010

Applicant

**SCHEME UNDER SECTION 74 OF THE UNIT TITLES ACT 2010
IN REGARD TO BODY CORPORATE 346799**

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**SCHEME UNDER SECTION 74 OF THE UNIT TITLES ACT 2010
IN REGARD TO BODY CORPORATE 346799**

BACKGROUND

- A. This is a Scheme governing proposed repairs to the building comprised within the unit title development situated at 135 Victoria Street West, Auckland, known as Victopia, and constituted by unit plan DP346799 ("**the Property**").
- B. This Scheme is intended to authorise repairs to the Property by way of contract(s) to be managed for and on behalf of the proprietors of units within the Property ("**the Owners**") by Body Corporate 346799 ("**the Body Corporate**").
- C. The Property has defects, including but not limited to:
- (a) Systematic cracking of the compressed fibre-cement sheet rainscreen cladding system to the northern, southern and western elevations.
 - (b) Failure of the liquid-applied waterproof membrane to the cantilevered concrete balconies on levels 13 and 14.
 - (c) Moisture leaking into the basement carpark.
- ("the Defects")**
- D. The Defects and the resulting damage to the Property are such that the Property does not comply with the requirements of the New Zealand Building Code. It is necessary to carry out remedial work to rectify the Defects and associated damage to the Property ("**the Repairs**").
- E. The terms "Defects" and "the Repairs" in this Scheme are to be given the widest possible interpretation and include any defects/repairs which may be identified by the Body Corporate in the course of investigating the Property and undertaking the Repairs.

- F. This Scheme is intended to:
- (i) Authorise the Body Corporate to act as agent for the Owners in respect of all matters related to the Repairs;
 - (ii) Authorise the Repairs by way of contract(s) managed by the Body Corporate on behalf of the Owners;
 - (iii) State how the cost of the Repairs is to be raised and recovered from the Owners;
- G. It is recognised that:
- (d) Once this Scheme is sanctioned and the Repairs start it will be impractical to stop the Repairs and the Body Corporate will be committed to having the Repairs completed.
 - (e) This Scheme and the Repairs it sanctions will best protect the integrity of the Property as a whole.

SCHEME PURSUANT TO SECTION 74 OF UNIT TITLES ACT 2010

Body Corporate 346799 to reinstate the Property pursuant to Section 74 of the Unit Titles Act 2010

1. A scheme is hereby settled pursuant to section 74 of the Unit Titles Act 2010 whereby the Body Corporate is required to reinstate the Property by undertaking the Repairs in accordance with the provisions set out below ("**the Scheme**").

Body Corporate Appointed as Owners' Agent

2. The Body Corporate is appointed to act as agent for each Owner in respect of all matters related to the Repairs. The Body Corporate shall have full and irrevocable authority to authorise, commit, and undertake the Repairs on behalf of each Owner.

Powers of Body Corporate in undertaking Repairs

3. The Body Corporate shall have the power(s) to:
 - (a) Engage suitably qualified persons to investigate, identify and quantify the extent of the Repairs that are required to the Property;
 - (b) Instruct suitably qualified advisors to develop plans and specifications for the Repairs, together with such variations or additions as from time to time may be required;
 - (c) Apply for and obtain all such consents, local body approvals and certifications as the law requires, and as the Body Corporate considers advisable, and to engage experts, as the Body Corporate considers necessary, to obtain such consents or local body approvals and certifications;

- (d) Engage suitably qualified experts to prepare and manage the tendering of the Repairs, review the tenders received and recommend a contractor(s) to undertake the Repairs;
- (e) Let the contract(s) for the Repairs to such contractors and tradespersons as the Body Corporate determines;
- (f) Sign all necessary contracts or other documents to enable the Repairs to proceed;
- (g) Undertake works to both common and unit property within the Property in accordance with this Scheme;
- (h) Employ suitably qualified project managers to oversee and/or supervise the Repairs carried out by contractors, to certify progress payments and to attend to payments of contractors;
- (i) Arrange any necessary insurance, including contractor's all risk insurance, as may be required throughout the Repairs;
- (j) Inspect and re-evaluate the Repairs required from time to time as it sees fit, and to alter or vary the Repairs to accommodate further work that the Body Corporate considers necessary;
- (k) Generally employ such advisors, managers, agents or assistants as the Body Corporate in its absolute discretion thinks fit for successfully completing the Repairs and fulfilling its obligations under this Scheme;
- (l) Delegate to such advisors or individuals such powers and authorities hereby given to the Body Corporate as it deems necessary to effectively progress the Repairs;
- (m) Carry out all ancillary matters to enable the Body Corporate to progress and properly finalise the Repairs;

- (n) Fully and properly carry out its obligations under this Scheme, and the Body Corporate is granted such powers and authority as may be necessary to enable the Body Corporate to do so.

Duties of Body Corporate in undertaking Repairs

- 4. In undertaking the Repairs the Body Corporate must:
 - (a) Apply due care and attention to the making of all its decisions;
 - (b) Seek advice from suitably qualified advisors where necessary in carrying out the Repairs and have regard to the advice of those advisors;
 - (c) Have the Repairs undertaken as diligently and as expeditiously as is practical;
 - (d) Obtain a building consent and all other consents that may be necessary for the Repairs, and upon the conclusion of the Repairs obtain a code compliance certificate and/or such other certificates as may be required by law.
 - (e) Arrange all necessary insurance that may be required throughout the course of the Repairs;
 - (f) Keep minutes of all meetings and decisions of the Body Corporate in connection with this Scheme and make the minutes available to the Owners upon request;
 - (g) Advise Owners on a regular basis of the decisions of the Body Corporate and the progress of Repairs;
 - (h) Provide the Owners with reasonable notice of any need to vacate their units, taking into account the need for the Owners to comply with their obligations to lessees and tenants;
 - (i) Liaise with its contractors to ensure that the period for which each unit needs to be vacant is as short as reasonably possible.

Raising funds to pay for the Repairs

5. The Body Corporate shall levy and collect from the Owners such money as it considers necessary in order to undertake and complete the Repairs and fulfil its obligations under this Scheme, on the following basis:
 - (a) The Owners shall pay for repairs to the exterior cladding in accordance with their ownership interests;
 - (b) The Owners shall pay for cost of repairing leaks to the basement car park in accordance with their ownership interests;
 - (c) The Owners of units on level 13 and level 14 shall pay for the cost of repairing their balconies;
 - (d) The Body Corporate shall determine how any remaining costs are to be levied and paid.
6. In raising funds to pay for the Repairs and apportioning the cost of the Repairs the Body Corporate shall engage a quantity surveyor or such other advisors as it considers necessary and shall take account of the advice of that quantity surveyor or other expert(s).
7. All work undertaken prior to the date of this Scheme by the Body Corporate and/or its agents in relation to the Repairs, including investigating the Defects and resultant damage to the Property, are deemed to be part of the costs of this Scheme.
8. The Body Corporate is authorised to demand payment of the levies issued under this Scheme to pay for the Repairs from each Owner in amounts and at times that the Body Corporate may from time to time determine.
9. The levies raised by the Body Corporate under this Scheme shall be deemed to be as effective and binding in law as if a contribution raised under section 121 of the Unit Titles Act 2010. The Body Corporate shall

have the right to sue or take other steps to recover the levies as if they had been raised under that Act.

10. In the event an Owner defaults in making payment of any levies raised under this Scheme by the due date(s):
 - (a) Interest shall accrue on the levies at the rate of 10% per annum from the due date of payment until the date payment is made.
 - (b) The Body Corporate shall be entitled to recover all legal and administrative costs incurred in relation to the recovery of the levies from the Owner in default, including full solicitor/client costs.
11. The Body Corporate may levy in excess of the estimated or final amounts to be paid by each Owner at any time if the Body Corporate considers that the Body Corporate may not be able to meet its obligations to pay any contractor, advisor, or any other party engaged in relation to the Scheme (whether by reason of non-payment of levies by an Owner or for any other reason).
12. Should the Body Corporate levy Owners in accordance with clause 11, then upon recovering such excess amounts, whether from the defaulting owner or any subsequent purchaser of the defaulting unit or otherwise, the Body Corporate shall refund the excess amounts to the relevant Owner(s) who paid the excess amounts.
13. The Body Corporate may borrow from third parties to pay for the Repairs and may levy the Owners to repay such borrowings and any interest which has accrued on the borrowings.
14. Where an Owner comprises more than one person and/or entities then:
 - (a) All such persons are deemed one Owner; but
 - (b) The provisions of this Scheme shall jointly and severally bind the individual persons comprising any such Owner; and

- (c) The Body Corporate may recover any levy raised under this Scheme from any of the multiple Owners.
15. The Body Corporate must:
- (a) Account to the Owners for all money that the Body Corporate or its agent(s) receives and expends on behalf of the Owners under this Scheme;
 - (b) Ensure that all the moneys received from Owners are only allocated and paid out for purposes authorised by this Scheme;
 - (c) Upon receipt of reasonable notice from any Owner supply to that Owner oral or written information relating to the funds received and expended for the Repairs and associated costs;
 - (d) For the purpose of this clause each Owner authorises disclosure of information regarding their particular apportionment and levies to all Owners.

Owner's Obligations

16. The Owners shall:
- (a) Co-operate with the Body Corporate in the implementation of this Scheme and comply with the Scheme in all respects;
 - (b) Grant access to their unit property to enable the Body Corporate to assess the extent of the Defects and compliance issues related to the unit and to allow the Repairs to be undertaken by the contractors engaged by the Body Corporate. The Owners shall make appropriate arrangements with their lessees and tenants to enable such access to take place;
 - (c) If required by the Body Corporate, vacate their unit (including any tenants) for as long as is necessary for the Repairs to be undertaken. The Owners shall make arrangements with their

lessees and tenants, taking into account the terms of the relevant leases/tenancies, to enable the units to be vacated;

- (d) Comply with the directions of the Body Corporate, its consultants and contractors to ensure that site safety requirements are complied with at all times;
- (e) Provide current contact details to the Body Corporate, including physical address, telephone and facsimile numbers and email address, as applicable.

Disputes

- 17. The Body Corporate's decisions on matters arising under this Scheme shall be final in all respects, except where:
 - (a) One Owner raises an objection which in monetary terms exceeds \$30,000; or
 - (b) Two or more Owners raise an objection the monetary value of which cumulatively exceeds \$60,000.
- 18. Owner(s) wishing to object to a decision of the Body Corporate must give written notice of their objection to the Body Corporate within 10 working days of receiving notice of the decision (notice shall be received by Owner(s) one working day after notification of the decision is sent to the Owner(s) last known address provided to the Body Corporate). The objection must be addressed to the Body Corporate manager and must outline in writing the grounds upon which the objection is made
- 19. The Body Corporate may, on giving notice to all disputing Owners, disregard dispute notices where the amounts in dispute are less than the costs thresholds set out in clause 17.
- 20. Upon receipt of an objection notice that complies with clauses 17 and 18 the Body Corporate will refer the matter to an arbitrator (to be appointed by the President of the Arbitrator's and Mediator's Institute of New Zealand) and the arbitrator shall determine the matter in accordance

with the provisions of the Arbitration Act. The arbitrator's decision shall be final. The cost of the arbitration shall be borne between the objecting Owner(s) and the Body Corporate as the arbitrator shall decide.

21. No Owner shall be entitled to withhold payment of levies that fall due on the basis that an objection is pending Arbitration.

Indemnity

22. The Owners jointly and severally indemnify and hold harmless the Body Corporate, its committee, members, and chairperson against all costs, expenses, claims and proceedings, and any other liability of any sort incurred by them in the exercise or attempted exercise of the powers granted to the Body Corporate under this Scheme but not against any act or omission done fraudulently or by wilful misconduct.

Transfer of Property

23. If an Owner sells, transfers or assigns his/her/its interest in a unit before the Repairs are completed and paid for the vendor Owner:
 - (a) Shall provide a copy of this Scheme to the purchaser and include a term in the agreement for the sale and purchase of the unit obliging the purchaser to abide by the terms of this Scheme;
 - (b) Shall remain bound by the terms of this Scheme and bound to pay any sums levied in respect of the Owner's unit under this Scheme to the extent that the purchaser of that unit fails to pay any such levy on time.
24. Any Purchaser of a unit shall be bound by the terms of this Scheme upon being registered as the Owner of that unit. The Body Corporate shall be entitled to levy the purchaser as if he/she/it were the Owner of the unit at the time this Scheme was made and may recover from the purchaser any levies due under this Scheme in respect of the purchaser's unit.

Authority

25. No third person dealing with the Body Corporate in relation to this Scheme will be obliged to verify the Body Corporate's authority.

Applications to the Court

26. The Body Corporate or any Owner may apply to the High Court to vary, modify or discharge this Scheme in accordance with section 74(8) of the Unit Titles Act 2010.